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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

VINCENT LEWIS GALLEGOS,

Defendant and Appellant.

H043366

(Santa Clara County

Super. Ct. No. C1351823)

Defendant Vincent Lewis Gallegos was convicted by jury trial of second degree murder (Pen. Code, § 187),¹ and the jury found true that he had personally used a knife in the commission of the murder (§ 12022, subd. (b)(1)).² He was sentenced to 16 years to life in prison.

At trial, defendant testified and admitted that he had killed the victim. He claimed that he had acted in self defense. The defense presented evidence that the victim had been involved in three physical confrontations with third parties. A prosecution witness, who was the victim's boyfriend and had been granted immunity, testified on rebuttal

¹ Subsequent statutory references are to the Penal Code unless otherwise specified.

² The jury found defendant not guilty of first degree murder.

about one of those incidents and asserted that he was responsible for one of the blows during that incident.

On appeal, defendant contends that the trial court prejudicially erred in omitting optional language in CALCRIM No. 226 that would have told the jury that one consideration in evaluating the credibility of a witness's testimony is whether that witness had been granted immunity. He alternatively contends that his trial counsel was prejudicially deficient in failing to request that this language be included in the instruction. We conclude that the omission of this optional language was not prejudicial in this case and therefore affirm the judgment.

I. Facts

Defendant testified at trial that he stabbed Errick Wright to death. There was no evidence presented at trial that defendant and Wright had met prior to the afternoon of Wright's death. Both Wright and defendant smoked marijuana regularly. Wright, who smoked marijuana every day, always bought his marijuana at a medical marijuana dispensary and always used "a tobacco wrap," a "paper . . . made out of tobacco," to smoke marijuana. He used a marijuana dispensary on First Street in downtown San Jose, which was near a light rail station.

Wright was five feet, six inches tall and weighed 154 pounds, and he had no history of carrying a knife on his person. He always carried his cell phone on his person. Wright had been to Guadalupe Oak Grove Park (the park) many times because his mother lived close to it. He and his boyfriend, Edgar Hernandez, had gone to the park to take their dogs to the dog park there and to "smoke marijuana."

On the morning of March 6, 2013, Wright dropped Hernandez off at Hernandez's workplace at 9:40 a.m. On their way to Hernandez's workplace, they smoked the strongest marijuana they had ever smoked. Strong marijuana generally made Wright calm, quiet, and lazy. Wright told Hernandez that he planned to visit a friend, Stacey

Edmonds, to give her some money, and Hernandez expected Wright to pick him up from work at 6:00 p.m. At around 11:00 a.m., Wright visited Edmonds in East San Jose to return to her some money he had borrowed. Wright told Edmonds that he was going to pick up Hernandez “in a little while” when Hernandez got off of work. Hernandez called and talked to Wright during Hernandez’s break at 12:35 p.m.

At 1:00 p.m., Wright was in downtown San Jose. Wright and Hernandez spoke again at 2:44 p.m. while Hernandez was on his lunch break, and Wright was still in downtown San Jose. Wright, who was talking in a more “macho” tone than usual, said he was “with Anerra” and they were “[j]ust riding around.” Anerra Clark was Edmonds’s daughter, who was a close friend of Wright’s cousin, Eva Christian. Wright was not with Anerra, who did not see Wright at all on March 6, 2013. This was the last conversation Hernandez had with Wright. Wright was still in downtown San Jose at 3:00 p.m. By 4:00 p.m., Wright’s phone was at the park, where it remained.

June and Michael Ferraro arrived at the park at about 3:00 p.m. to walk their dogs. The Ferraros took their dogs past the restrooms to a dog park at one end of the park and then continued walking around the park’s trail that forms a loop. They saw no blood stains on the loop trail on their first loop, and no one was at the restrooms when they passed by. After their first loop, they stopped at the restrooms. June saw a “reddish” “article of clothing” on the floor close to the doorway of the women’s restroom. While June was in the women’s restroom, Michael saw defendant exit the men’s restroom and walk up the trail. June came out, and Michael went into the men’s restroom. He saw a baseball cap on the floor. Michael used the restroom, and then the Ferraros headed back up the trail. They had been at the park for about half an hour at that point.

As they walked up the trail, defendant “jumped out of the bushes and said . . . something like, ‘Call the police,’ or ‘Call 911. My friend is injured.’” Defendant was six feet tall and 182 pounds. He had emerged from “very tall bushes.” It had been five to eight minutes since Michael had seen defendant exit the men’s restroom.

Defendant led June through the bushes to where Wright was lying on the ground. Wright was lying on his back “and barely breathing.” There was “a lot of blood on his jeans and his hands.”

June returned to the trail to find someone to call 911. Amy Desantis was walking her dogs in the park and also heard defendant calling for help at about 3:50 p.m. After June returned to the trail, defendant led Desantis into the bushes where she saw Wright lying on the ground. Desantis asked defendant “‘what happened.’” Defendant, who seemed nervous, responded: “‘Oh, my friend and I came to smoke some weed, and I left and I came back and I saw this.’” Wright was still breathing, but he was gasping for air and suddenly stopped breathing about a minute after Desantis arrived. Desantis and the Ferraros called out to Jeffrey Sauer, who was walking his dog and had a cell phone, and they asked him to call 911. Sauer called 911, reported that a man had been “stabbed or shot, or something,” and joined Desantis by Wright’s body. Defendant put a sweatshirt over Wright’s face. He walked back toward the restrooms and “was just pacing around” in front of the restrooms while they waited for the police to arrive.

A 911 call was received a few minutes before 4:00 p.m. reporting a possible shooting or stabbing incident. Officer Elliot Sagan arrived at the scene at 4:01 p.m. Defendant was “walking around very slowly,” “almost around in circles,” near the restrooms with “his head down.” Sagan asked defendant if he was okay, and defendant said “‘Yeah.’” Sauer flagged down Sagan and accompanied him to where Wright’s body was lying. Sagan declared Wright dead after concluding that he had no pulse.

The Ferraros returned to the bench by the restrooms. June found defendant sitting on the bench, sat down next to him, and told him she was sorry about his friend. Defendant seemed “detached” and told June that he had left the park to go downtown and when he returned he found his friend injured. He also said “that somebody was going to blame him for this.”

When Officer Shawn McCarthy arrived at the scene, he approached defendant and asked him if he was a friend of the victim. McCarthy saw that defendant had blood on his arms, hands, and clothing, but he saw no indication that defendant had suffered any injuries. Defendant told McCarthy a false story about having been picked up “around 3 or 4” in a blue Nissan SUV by a man named “G.” or “Jamal” with whom he’d gone to high school. Defendant told McCarthy that there were two other men and a woman in the SUV. After the five of them “smoked a blunt” in the SUV, defendant claimed he left the park with his cousin, went “to the east side” to change his clothes, and returned to the park.³ He heard “noises” and found the victim lying in the bushes “all bloody.” He tried to pick the victim up unsuccessfully and then summoned assistance. Defendant’s statements made McCarthy suspicious because it would have taken a half hour to drive to East San Jose at that time.

Defendant provided a similar statement to Lieutenant Stephen Lagorio, but this time he identified the victim as “Errick Wright” and said another person “named G.” was driving the blue SUV, in which Wright was a passenger. Lagorio saw “some minor nicks and scratches” on defendant’s hands, which appeared to have been freshly washed, and scratches on his right forearm. Defendant had blood on his clothes but not on his hands.

Defendant was interviewed at the police station that evening. When the police asked him if he had a girlfriend or a boyfriend, defendant responded “I’m not gay.” During this interview, defendant claimed that he had telephoned Wright after he got off work that afternoon.⁴ He said he had met Wright a month earlier downtown after Wright claimed to have gone to high school with defendant. On that occasion, Wright had smoked a blunt with defendant in Wright’s car and given defendant his phone number.

³ Defendant later explained to the police that a “blunt” was “a cigar wrapped full of weed.”

⁴ Defendant had worked in Milpitas from 9:30 a.m. to 1:00 p.m. on March 6.

Defendant provided an elaborate story about how they arranged to meet on March 6, 2013, and after a long journey by defendant involving three bus rides and a light rail trip, which defendant described at length, Wright had picked him up. Because the route defendant described would have taken at least two and a half hours and would have meant that his rendezvous with Wright occurred after Wright's death, the police did not believe him. In this tale, Wright was driving the blue SUV and had just two other passengers, whom defendant described in detail.

Defendant told the police that they smoked "our first blunt" in the SUV, subsequently arrived at the park, and then smoked another in the men's restroom. His cousin Isabel "just showed up out of the blue" and drove him home to change his pants.⁵ Defendant said he and Wright had arranged to meet back at the park when defendant returned. When he returned an hour later, defendant did not see Wright, so he went to the men's restroom "to piss and wash my hands and wash my face." He saw Wright's hat in the men's restroom and his sweater in the doorway of the women's restroom. After he had used the restroom, defendant sat on the bench outside the restrooms, heard noises in the bushes, went to discover the source of the noise, and found Wright on the ground asking for help. Defendant unsuccessfully tried to help him, dragged Wright "five or ten feet into a clear grass area," noticed Wright's "puncture wounds," and then summoned assistance. He returned to the restroom, got Wright's sweater, and "threw the sweater over his head." Defendant denied having any injuries other than a "scratch" on his neck that he claimed he had suffered when he tried to pick up Wright. The police observed scratches and "nicks" on his hands and arms, and noticed that one of his sleeves was ripped.

⁵ Defendant and Wright were planning to "drink a little bit" and spend the evening together with "some females," so defendant wanted to have clean pants. However, defendant also told the police that his "work jeans," which he had changed out of after work, were in his backpack, which he had left inside the "blue SUV."

The police asked defendant: “Did he [(Wright)] try to pick up on you?” Defendant responded: “No, he didn’t . . . I would have fucking flipped, but he didn’t.” When the police made it clear that they did not believe that he had gone all the way home to the east side just to change his pants, defendant changed his story. He admitted that his previous tale was not true. Defendant admitted that Wright had picked him up in Wright’s white Lincoln, and there had been no blue SUV. He now claimed that he had left the park on foot for 30 to 45 minutes to go “sell a dub down the street” for \$20 at Wright’s instruction after Wright received a phone call. He claimed to have sold the “dub” to a white man on a bicycle. Defendant’s description of his route did not comport with reality, and the police told him that Wright’s phone records did not show any incoming calls at that time.

When the police challenged his tale of the “dub” sale, defendant claimed instead that he was absent from the park when Wright was attacked because he was “down the street from the park” “chilling behind a bush and a rock . . . doing some fucking crack out of a pipe”⁶ He claimed that he then went to the restroom and “I throw the fucking crack down the toilet” before coming out and finding Wright in the bushes. Defendant insisted “I didn’t stab” Wright and “I didn’t fight with” Wright. He said he never was “violent” and was “the mellowest person you’ll ever meet.” Defendant also said that Wright “didn’t get mad in anyway” and “didn’t come at me in any wrong way” The police asked him “is there any reason to believe that anybody’s DNA would be on your underwear,” and defendant responded: “Hell no, I ain’t gay”

The police allowed defendant to call his mother. During this recorded conversation, he told his mother: “[Y]ou should check my closet, because . . . supposedly the dude got stabbed and I never had, I never left the house with a knife on me. . . . I don’t have my blade that’s why I never left the house with it, so I never had a blade to get

⁶ A blood test later showed that defendant had no trace of cocaine in his system.

down with that fool in the first place.” After that conversation, defendant told the police: “I didn’t have no weapons on me and I didn’t fight the dude.” “I don’t even hurt him with a knife. I don’t have a knife. I didn’t have a knife on me all day today. . . . [T]hey wouldn’t have a fucking knife. I don’t think so.” In a subsequent conversation with his mother, defendant said: “I don’t know if he was gay. He came out straight to me. He even came out as a cool dude to me. I don’t know what the fuck he was. . . . I don’t swing that way.” He said that the police were suggesting that “you and him went into the restroom alone and um, he did something that triggered you”

No blood was found in the men’s restroom, but Wright’s hat was found there “in the middle of the two sinks.” Blood was on the door frame to the women’s restroom and on the floor near the door frame. There was blood in front of the restrooms, including Wright’s blood right in front of the women’s restroom. Blood in a dirt area in front of the restrooms and Wright’s shoeprints suggested that a struggle had taken place there. The amount of blood at this location suggested that most of the bleeding happened here, and the “scuff marks” indicated that a “prolonged struggle” had occurred there. Larger amounts of blood suggested that Wright had been bleeding while lying down near a path some distance from the restrooms and then had been dragged off into the grassy area and the bushes. There were “drag marks” near the larger bloodstains, and the drag marks led off into a grassy area. Wright’s body was found nearby through an opening in the bushes. It appeared that he had been dragged by his arms into that area.

Despite a thorough search of the park, the murder weapon was not found. Wright’s keys were found in an “opening” in a tree, and a cell phone was discovered in a hole beneath a tree. Defendant’s red bandana was found in the bushes. Defendant’s backpack was found in the backseat of Wright’s car.

Wright had suffered 20 stab wounds. He had a stab wound to the left side of his chest that was three inches deep and penetrated his lung. Another stab wound was between his lower left chest and abdomen. Wright had two stab wounds to the back of

his head, one of which was at the base of his skull where it met his neck. Another stab wound was to the nape of his neck. Wright had stab wounds to his left forearm, his right buttock, and his right shoulder, and many stab wounds to his back. One of the stab wounds to his back was four inches deep and penetrated his left lung. The cause of death was the two wounds that penetrated his left lung. These wounds caused Wright's lung to collapse and his chest to fill with blood. A person suffering such wounds "would have minutes," meaning five to 10 minutes, before losing consciousness. The other 18 stab wounds were "with medical care, totally survivable." Wright also had cuts and slashes on the palm of his right hand. These appeared to be defensive wounds suffered in trying to ward off a knife. Defendant's DNA was found under Wright's fingernails. There were scrapes on his left knee and left hip, abrasions on his right hip and right shoulder, and abrasions and swelling on his forehead. "[R]oad rash type" of abrasions on his lower back indicated that he had been dragged. Wright's sweatshirt was saturated with blood.

Blood tests showed that both defendant and Wright had THC in their blood. THC is the active ingredient in marijuana. Wright had a high amount of THC in his blood.

II. Procedural Background

The defense informed the prosecution in advance of trial of the nature of the defense that would be presented at trial. "The self-defense claim that we're going to bring . . . [is] that [defendant] was sexually assaulted by the decedent in a public restroom, and as a result of this assault, [defendant] acted in self-defense and he stabbed the decedent multiple times." "The self-defense that's being claimed here is self-defense from a sexual assault that involved forceable [*sic*] contact; namely, grabbing of [defendant's] private parts." The defense planned to introduce evidence of Wright's past violent acts to suggest that Wright was the aggressor.

Hernandez, Wright's boyfriend, testified for the prosecution in its case-in-chief. Hernandez and Wright had been living together in an "official relationship" since early

2010 and by 2013 were “talking about marriage.” Hernandez testified that he and Wright had a “disagreement” on one occasion in 2009. There was screaming and “[p]ushing and shoving,” and Hernandez “called the cops.” However, Hernandez testified that, on that occasion, Wright was “[a]ggressive,” but “[n]ot violent.”

Defendant’s mother testified at trial regarding defendant’s “character for violence.” She asserted that “[h]e’s really, mellow” and “is the type to just walk away” when her “older kids” “hit” or “punched him.” She declared: “He’s not violent.”

Defendant testified at trial on his own behalf. He was 20 years old at the time of Wright’s death. He testified that he had been molested when he was a small child and physically assaulted by two of his mother’s boyfriends when he was older. On the day of Wright’s death, defendant had gone to work wearing a folding “buck knife” in a “holster” on his belt. After work, he caught a ride from a coworker and then walked to downtown San Jose, where he intended to catch the light rail home. However, Wright, whom he had never met before, approached him at the light rail station and asked if he “wanted to buy some weed.” Defendant declined and explained that he did not have money to buy marijuana. Wright then offered to give him some “weed” if defendant would “help him bag up some weed.” Defendant agreed to this proposition because he “wanted to smoke weed.” He got into Wright’s nearby car, and Wright asked if he wanted to smoke some marijuana. Defendant said “yeah,” and Wright produced a cigar and asked for defendant’s knife, which defendant was openly wearing in a belt holster. Defendant handed over his knife, and Wright used it to cut open the cigar wrap.⁷ Wright emptied the cigar wrap of tobacco and filled it with marijuana. He rolled it back up, and they

⁷ Hernandez testified on rebuttal that he and Wright never used a knife to remove tobacco from a cigar wrap. “We always used our hands” because the wrap was “very easy” to tear open.

smoked it. They followed that up with a second one, which they smoked while Wright was driving his car. Defendant felt “[h]igh” and “[r]eally tired.”

Wright told defendant that he needed to go to the park to “[d]rop off the weed I was supposed to bag.” When they arrived at the park, they hung out in the car for a while, around 10 minutes, and then defendant got out and sat on a bench next to the restrooms. Defendant was not sure if Wright returned defendant’s knife after he used it to create the marijuana cigars. After a few minutes on the bench, defendant used the restroom and washed his hands and face. While he was washing, Wright came up behind him, reached between defendant’s legs, and grabbed his “balls.” Defendant “shoved him away” and began punching him. Defendant punched Wright multiple times in the head before Wright “caught one of my arms,” which caused defendant to slip and fall.

As defendant was getting up from the restroom floor, he saw that Wright had defendant’s knife in his hand “at his side.” Defendant stood up, and they began “wrestling over the knife” in the restroom. Defendant gained control of the knife and left the restroom, with Wright following him.⁸ Defendant testified that he was not injured during the restroom confrontation. In front of the restrooms, Wright grabbed defendant’s legs and knocked him to the ground. Wright “was on top of” defendant, but defendant still had the knife.⁹ Defendant repeatedly struck at Wright with the knife because he feared Wright would use the knife on him. He kept striking at Wright because Wright would not let go of him. Eventually, defendant was able to free himself from Wright. He got up, and Wright “did the same thing.”¹⁰ Wright said: “‘Stop. Stop. I’m done.’”

⁸ On cross, defendant’s description of his confrontation with Wright changed. In this version, defendant struck Wright with the knife before they left the restroom.

⁹ On cross, defendant testified that he dropped the knife, and it was on the ground for a brief time until he regained it.

¹⁰ On cross, defendant testified that after he got up Wright was holding on to his leg. Defendant “struck at him again,” and Wright “caught the knife in his hand.”

Defendant testified that he did not intend to kill Wright but only wanted to “get away from him.”

Defendant, who still had the knife, “ran out of the park” and tossed the knife and his holster into some bushes next to a house. As he was leaving the park, he saw Wright running down a path. Defendant returned to the park because he wanted Wright to give him back his backpack, which he had left in Wright’s car. Defendant first looked for Wright around the restrooms. He went into the men’s restroom and noticed that he had blood on his hands and arms. He washed it off. When he came out of the restroom, he saw Michael Ferraro. Defendant walked up the path but did not see Wright anywhere. He heard some sounds in the bushes, and he found Wright lying on his side in the bushes looking “injured.” Defendant went into the bushes and tried to lift Wright up “to help him.” He was not able to lift Wright, so he began calling for help.

After others came to Wright’s aid, defendant returned to the restroom to wash up again. He saw Wright’s hat on the restroom floor, and he picked it up and put it on the sink. Defendant saw Wright’s sweatshirt by the women’s restroom, and he picked it up. A cell phone and some keys fell out of it. Defendant put these in his pocket and took the sweater to where he had left Wright. He put it over Wright. Defendant “panicked” and “didn’t want any of his belongings on me.” He put the keys “into the tree” and the phone into a hole. Defendant returned to the bench by the restrooms and sat down. Defendant testified that he lied to the police because he did not trust them.

On cross, defendant admitted that he had “fought before,” had been in “several fights,” and was “constantly getting into fights at school.” He was “angry as a child.” As a 16-year-old, he “always want[ed] to fight,” would “hold [his] anger in,” and then would “blow up on” someone. On one occasion when he was 16, a friend “swung a bat at” him, and defendant “grabbed him by his neck and I shoved him into a window.” Defendant claimed that he was “not that same person no more.”

When he was questioned about why he had told “very detailed” lies to the police, he repeatedly responded “I was desperate to get out of the situation.” “Almost everything that I said was a lie.” Defendant testified that he did not tell the police that Wright had grabbed him because he “didn’t feel comfortable talking to them about that.” He could not explain why he had not told the police that Wright had attacked him with a knife. Defendant admitted that he never saw any large amounts of marijuana in Wright’s possession or any baggies.

Defendant’s neighbor, who had known him for about a year, testified that he had “never seen [defendant] violent.” Rahn Minagawa, a clinical psychologist, testified that people who have suffered “complex trauma,” as defendant described, during childhood can become hypervigilant and perceive threats “that aren’t there.” Minagawa had met with defendant three times and reviewed his records, and he testified that defendant suffered from PTSD and complex trauma. He had not “diagnosed” defendant with complex trauma because complex trauma was not a diagnosis. Minagawa’s diagnosis was based solely on what defendant had told him. Defendant had told Minagawa that his knife fell out of its holster while he was in the restroom.

The defense presented evidence that Wright had been violent on prior occasions. Wright’s former live-in boyfriend testified that Wright had hit him with his fist and clothes hangers on two occasions during their relationship. One time in 2007, Wright, who was intoxicated, blocked him from leaving their home, and they ended up wrestling for a couple of minutes before the former boyfriend locked himself in the bathroom and summoned assistance. Wright forced his way into the bathroom before law enforcement arrived. On another occasion, also in 2007, when the former boyfriend, who had a restraining order against Wright, was trying to leave in his car, Wright hung on to the door of the car as it was being driven away, grabbed the window, and punched and broke the window. Wright managed to get into the car, grabbed the former boyfriend by the collar, and punched him more than once, resulting in injuries to the former boyfriend’s

face and upper back. However, on cross, the former boyfriend testified that he did not consider Wright to be a violent person.

Jamal Shabazz testified that he had dated Wright's cousin Eva Christian. Shabazz testified that in October 2012, Wright and Hernandez "attacked" Shabazz while Shabazz and Christian were at a park "making out." At that time, Christian had run away from home. Shabazz testified: "So I felt somebody kick me in my private part. And then, yeah, it was over after that." He could not see who had "stomped" on him. After the pain subsided, he rolled over and saw Hernandez and an unfamiliar woman. The woman was "holding back Eva." Shabazz testified that he "didn't see [Wright] at the time" but "saw him at the end." "They started kicking and punching me," but he could not see who was doing that because he was curled up in a fetal position. "They" kicked him in the head and face. He "couldn't honestly say" how many people were assaulting him, but "it was probably two people," and "I know it was more than one." Shabazz thought there were two attackers because he "was getting multiple hits from front and behind." Shabazz believed that his attackers were Hernandez and Wright. He was "pretty sure" that Wright was the person who kicked him in the back of the head, but he did not see him do that. Shabazz saw Wright only after he had gotten up and Wright, Hernandez, and the woman were "running away to the car." Shabazz testified that he had never met Wright prior to the attack. Yet he knew that Wright thought he was cheating on Christian, and Shabazz assumed that Wright thought he was "not good enough for his cousin."

Hernandez testified as a prosecution rebuttal witness after he was granted "full use and transactional immunity" by the prosecution for anything he might have done during the Shabazz incident. Hernandez testified that he, Wright, and two women had approached Shabazz and Christian in the park. They asked Christian to come with them, and Shabazz told her not to. Shabazz and Wright exchanged words. Shabazz started calling Wright derogatory names. Wright and Shabazz "started pushing each other" and

“punching one another.” They ended up “rolling on the ground” with Wright “on top.” Christian tried to intervene, and Shabazz “started choking” Wright. Hernandez leaned down and started punching Shabazz “so he would let go” of Wright. When Shabazz failed to release Wright, Hernandez “stomp[ed]” Shabazz “in the groin.” Shabazz released Wright, and Hernandez, Wright, and the two women immediately left the park. On cross, Hernandez testified that he had hit Shabazz multiple times, but he had not kicked him in the head or face. Hernandez also admitted that he had been “granted immunity” for his testimony.

After the close of evidence, defendant’s trial counsel asked the court to strike Hernandez’s testimony on rebuttal about the assault on Shabazz because the prosecutor had failed to disclose information about Christian that the prosecutor had had in advance of trial. The defense investigator had learned after the close of evidence that Christian would have corroborated Shabazz’s testimony that Wright was the initial aggressor in the assault. The court denied the request to strike Hernandez’s rebuttal testimony.

The defense and the prosecution then stipulated to what Christian’s testimony would have been, and this stipulation was read to the jury. “It is stipulated by the parties that if Eva Christian was to testify she would testify that: A few days before the park incident involving Jamal and [Wright], [Wright] saw Jamal with another female holding hands and walking down the street. Eva would testify that she had run away. [¶] Eva would also testify that prior to the altercation with Jamal Shabazz, [Wright] was angry with Jamal. Eva would further testify that [Wright] found Jamal Shabazz with Eva at a park and words were exchanged. [Wright] said to Jamal, ‘Get off my cousin,’ and she [sic] started fighting. [¶] Eva would testify that [Wright] threw the first punch and was the aggressor. Eva would further testify that she did not see anyone kick him in the balls. [¶] She would further testify that Jamal seemed okay and did not have any complaint of pain.”

The court instructed the jury at the commencement of trial with CALCRIM No. 226, and again at the end of the trial.¹¹ At the instruction conference, the court asked the attorneys “are you approving the following instruction numbers: . . . 226 as drafted?” Defendant’s trial counsel responded: “Yes, I am.” Defendant’s trial counsel also affirmed that he was not requesting “any additional instructions.” CALCRIM No. 226, as given, did not mention that the jury could consider whether a witness had been granted immunity. However, it did tell the jury that it could consider “anything that reasonably tends to prove or disprove the truth or accuracy of that testimony.” It also told the jury it could consider: “Was the witness’ testimony influenced by a factor such as bias or prejudice, a personal relationship with someone involved in the case, or a personal interest in how the case is decided?”

The prosecutor argued that defendant could not be believed because he created such elaborate lies when he talked to the police. The defense emphasized the testimony

¹¹ The full instruction read: “You, alone, must judge the credibility or believability of the witnesses. In deciding whether testimony is true and accurate use your common sense and experience. You must judge the testimony of each witness by the same standards, setting aside any bias or prejudice you may have. [¶] You may believe all, part, or none of any witness’s testimony. Consider the testimony of each witness and decide how much of it you believe. In evaluating a witness’s testimony you may consider anything that reasonably tends to prove or disprove the truth or accuracy of that testimony. And among the factors that you may consider are: [¶] How well could the witness see, hear, or otherwise perceive the things about which the witness testified? [¶] How well was the witness able to remember and describe what happened? [¶] What was the witness’s behavior while testifying? [¶] Did the witness understand the questions and answer them directly? [¶] Was the witness’s testimony influenced by a factor such as bias or prejudice, a personal relationship with someone involved in the case, or a personal interest in how the case is decided? [¶] What was the witness’s attitude about the case or about testifying? [¶] Did the witness make a statement in the past that is consistent or inconsistent with his or her testimony? [¶] How reasonable is the testimony when you consider all the other evidence in the case? [¶] Did other evidence prove or disprove any fact about which the witness testified? [¶] Did the witness admit to being untruthful? [¶] Has the witness been convicted of a felony? [¶] Has the witness engaged in other conduct that reflects on his or her believability?”

of Wright's former boyfriend about Wright's domestic violence against him. Defendant's trial counsel also briefly mentioned Shabazz's testimony about being "attacked by Errick Wright and Edgar Hernandez." He argued: "What's important to consider here is the priors of Errick Wright. His violent temper. The fact when his buttons get pushed he loses control. In these priors you can see how he cut his hand from punching out a window. He cut his leg from crawling into that window. And he kept fighting in those priors." "Those priors that you heard showed some violent conduct. . . . And up until a few months before he was killed he's still out there beating up a 17-year-old kid. Attacking him at a park. So that shows his violent temper. It didn't stop at some point. [¶] Right up until he's killed he's acting violently. He's attacking people at a park. Kicking him in the face."

The prosecution's rebuttal argument discounted Wright's attack on his former boyfriend on the ground that it was "a completely separate situation when you're arguing over relationship issues in the heat of the moment when you're drunk." She also discounted the Shabazz incident. "Jamal is a total punk, according to Errick. And we saw how he acted on the stand. He's ha[d] a felony vandalism conviction, theft conviction. And Eva was with him. So from Errick's point of view his 15-year-old cousin is dating a total punk, who he just saw a week prior with another girl. So now his 15-year-old cousin has run away. They're looking for her and they find her with her punk boyfriend at a park. [¶] And Jamal lied and said that it was completely unprovoked, that no words were exchanged. And all of a sudden he starts getting pummeled. And we know that's not true, based on what Eva said. Eva claimed that Errick said, hey, get off my cousin. Edgar told you that words were exchanged, and then a fight ensued. Does that equal attacking someone violently in a park? Jamal was not injured, and the police were never called." The prosecutor also pointed out that defendant was six inches taller and 25 pounds heavier than Wright.

The jury acquitted defendant of first degree murder and convicted him of second degree murder. It also found true the personal use of a deadly weapon allegation. The court denied defendant's new trial motion and sentenced him to 15 years to life in prison consecutive to a one-year term for the weapon enhancement.

III. Analysis

Defendant contends that the trial court prejudicially erred in failing to sua sponte supplement CALCRIM No. 226 with optional language informing the jury that it could consider whether a witness had been granted immunity in evaluating that witness's testimony.¹² Defendant argues that "[t]he fact Hernandez was granted immunity triggered a sua sponte duty on the trial court's part to instruct pursuant to CALCRIM No. 226 that in evaluating a witness's testimony, the jurors could consider 'anything that reasonably tends to prove or disprove the truth or accuracy of that testimony,' and that among the factors they could consider was whether Hernandez was promised immunity in exchange for his testimony." Defendant contends that, if the error was forfeited, his trial counsel was prejudicially deficient in failing to request that the optional language be added to the instruction.

The Attorney General argues that the trial court had no sua sponte obligation to include the optional immunity language in CALCRIM No. 226 and that defendant's trial counsel forfeited any claim that the optional language should have been added to the instruction by failing to request it and approving of the instruction as given. The Attorney General asserts that there was no prejudicial deficiency because defendant's trial counsel may have had a strategic reason for not wanting the language added and, in any case, the omission of the language was not prejudicial.

¹² The optional language reads: "Was the witness promised immunity or leniency in exchange for his or her testimony?" (CALCRIM No. 226.)

We need not consider whether defendant's claim of instructional error was forfeited or whether defendant's trial counsel was deficient in failing to request the optional language be added to the instruction because the record in this case establishes that the omission of the optional immunity language from CALCRIM No. 226 was not prejudicial to the defense.

This type of instructional error claim is reviewed under the standard set forth in *People v. Watson* (1956) 46 Cal.2d 818 (*Watson*). (*People v. Lucas* (2014) 60 Cal.4th 153, 289.) Reversal is required "only when . . . it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*Watson*, at p. 836.) "'[A] 'probability' in this context does not mean more likely than not, but merely a *reasonable chance*, more than an *abstract possibility*.'" [Citation.]"' [Citation.]" (*People v. Wilkins* (2013) 56 Cal.4th 333, 351 (*Wilkins*).)

A claim that trial counsel was prejudicially deficient merits reversal only when a defendant establishes "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland v. Washington* (1984) 466 U.S. 668, 687, 694 (*Strickland*).) The defendant must show that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." (*Strickland*, at p. 687.)

The optional immunity language that was not included in CALCRIM No. 226 as given to the jury in this case was of virtually no value to the defense.

The only witness to whom this language could have been relevant was Hernandez. Yet CALCRIM No. 226 as given to the jury already told the jury that it could "consider anything that reasonably tends to prove or disprove the truth or accuracy" of a witness's testimony, including whether that testimony was "influenced by a factor such as bias or prejudice, a personal relationship with someone involved in the case, or a personal interest in how the case is decided." Hernandez was Wright's live-in boyfriend, so the

jury was plainly aware that his personal relationship with Wright and his personal interest in the case against the man who had killed Wright might influence his testimony. Adding to CALCRIM No. 226 an express reference to the fact that the jury could consider a witness's immunity would have added little if anything to the jury's evaluation of Hernandez's testimony about the Shabazz incident.

Furthermore, Hernandez's testimony about the Shabazz incident was not significantly damaging to the defense or helpful to the prosecution. The defense sought to show that Wright had a history of violence by presenting evidence of three instances of Wright's violence. Two were incidents during which Wright assaulted and inflicted injuries on his former boyfriend. Both of those incidents were reported to the police and testified to by both the former boyfriend and the responding officers. The only other incident was Wright's encounter with Shabazz.

Shabazz testified that, without preamble, he was suddenly kicked in the groin by someone *who he could not see*. Even after the kick, he did not see Wright but only Hernandez and a woman. The kick to the groin was followed by "two people," who he *believed* were Hernandez and Wright, kicking him in the head and face from both the front and back. He could not confirm the identity of his assailants because he was curled up in a fetal position. Shabazz was "pretty sure" that Wright was the person who kicked him in the back of the head, but he did not see him do that. The only time Shabazz saw Wright, whom he had never met before, was when Wright, Hernandez, and the woman were "running away to the car." At best, Shabazz's testimony suggested that Wright was present during the assault and may have been the person who kicked him in the back of the head.

Hernandez testified that the encounter between Shabazz and Wright began with an exchange of words between the two men and developed into a physical fight in which they were "rolling on the ground" with Wright "on top." When Shabazz "started choking" Wright, Hernandez intervened and began punching Shabazz and "stomp[ed]"

Shabazz “in the groin.” Shabazz then released Wright. Hernandez testified that he had not kicked Shabazz in the head or face. Thus, Hernandez’s testimony was that Wright engaged in a physical fight with Shabazz in which Wright was “on top,” and that Hernandez was not responsible for kicking Shabazz in the head or face. Although Hernandez and Shabazz disagreed about whether the assault was preceded by an exchange of words, Hernandez’s testimony was not inconsistent with Shabazz’s claim that Wright was involved in the assault on him, and Hernandez did not claim credit for the only blow that Shabazz attributed to Wright, the kick to his head. Christian confirmed Hernandez’s testimony that the fight was preceded by an exchange of words and identified Wright as the instigator of the physical altercation.

In this context, the fact that Hernandez had been granted immunity for his testimony about the Shabazz incident was trivial. Hernandez actually confirmed that Wright had assaulted Shabazz. Hernandez’s acceptance of credit for kicking Shabazz in the groin was consistent with Shabazz’s testimony, since Shabazz did not see the person who kicked him in the groin and saw Hernandez, not Wright, immediately after the kick. Hernandez’s testimony that words were exchanged before the physical altercation was confirmed by Christian.

The defense’s reliance on Wright’s prior instances of violence was a very weak aspect of the defense since these prior incidents were motivated by strong emotions associated with long-standing relationships. Wright’s assaults on his former boyfriend were instances of domestic violence. His assault on Shabazz was motivated by his attempt to protect his young cousin from being exploited by Shabazz. In contrast, according to defendant, he and Wright had just met a couple of hours before Wright’s death. Even if the jury believed that Wright had a history of violence, the defense could not succeed unless it could explain why defendant, who had suffered no injuries, had needed to stab Wright 20 times. Wright’s assault on Shabazz was of no value in explaining that.

We find that the alleged instructional error and the alleged deficiency were not prejudicial and therefore do not merit reversal of the judgment.

IV. Disposition

The judgment is affirmed.

Mihara, J.

WE CONCUR:

Elia, Acting P. J.

Bamattre-Manoukian, J.

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